

Supreme Court, U. S.

FILED

NOV 15 1976

IN THE
SUPREME COURT OF THE UNITED
OCTOBER TERM, 1975

SMITHES RODAK, JR., CLERK

NO. 75-1864

LLOYD GARMISE,

Petitioner,

-VS-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

APPENDIX AND
BRIEF OF RESPONDENT IN OPPOSITION

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OPINION BELOW

The decisions below are reported as:

Garmise v. State, 311 So.2d 747 (Fla. 3d D.C.A. 1975) app. dism. 328 So.2d 841 (Fla. 1976) and are set forth in the Appendix to the Petition.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

I

WHETHER PETITIONER'S MISINTERPRETATION OF THE FLORIDA CONSTITUTION PRESENTS A FEDERAL ISSUE?

II

WHETHER PETITIONER'S FAILURE TO RAISE HIS FEDERAL CLAIMS IN THE TRIAL COURT AND IN THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA JUSTIFY THIS COURTS DENIAL OF THE PETITION FOR WRIT OF CERTIORARI?

STATEMENT OF THE CASE

Respondent accepts that part of petitioner's statement of the facts as are supported by reference to the transcript encompassed in the record on appeal. Respondent expressly rejects petitioner's reliance upon the "Inquest Minutes", as a transcript thereof was never introduced as evidence to the jury, never presented to the trial judge for his consideration, and never made a part of the record on appeal in either the District Court of Appeal or the Supreme Court of Florida.

ARGUMENT

I

PETITIONER'S MISINTERPRETATION
OF THE FLORIDA CONSTITUTION
PRESENTS NO FEDERAL ISSUE.

In 1972 Article V of the Florida Constitution was amended. The new Article V took effect on January 1, 1973. The old and new versions of Article V, in so far as it relates to the appellate jurisdiction of the Supreme Court of Florida are set out as Appendix "A - D" and "E - G".

Prior to 1973, the Supreme Court of Florida had no authority to hear a direct appeal solely by virtue of the imposition of a sentence of life imprisonment. However, contrary to petitioner's assertion, Article V §3(b)(2) did not entitle the petitioner to "appeal to the State Supreme Court as of right." The constitutional provision in question commences with the words, "When provided by general law." As the Florida Legislature has not seen fit to enact any such "general law," the situation in the instant cause is not unlike

that which arose in Wells v. State, 38 So.2d 464 (Fla. 1949) wherein the Supreme Court of Florida noted:

Though the judicial power and jurisdiction of the Supreme Court exists under the Constitution the exercise thereof may be invoked only through specified common law or statutory methods.

The constitutional provision in question is not self executing. It expressly requires legislative action to give it life. Such non self-executing provisions have and still do exist in the Florida Constitution see, Advisory Opinion to Governor, 156 Fla. 55, 22 So. 458 (Fla. 1945); Lewis v. Florida State Board of Health, 143 So.2d 867 (Fla. 1st D.C.A. 1962) cert. den'd. 149 So.2d 41 (Fla. 1963).

The dismissal of petitioner's appeal by

the Supreme Court of Florida is not an example of invidious discrimination, for no defendant has been accorded a direct appeal to the Supreme Court of Florida solely on the basis of a life sentence. Further, the Supreme Court of Florida's recognition of an unambiguous State Constitutional provision, is not an example of arbitrariness, for it is the petitioner who has chosen to misinterpret the provision in a manner inconsistent with the plain meaning of the words used.

II

PETITIONER'S FAILURE TO RAISE HIS FEDERAL CLAIMS IN THE TRIAL COURT AND IN THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA, JUSTIFY THIS COURT'S DENIAL OF THE PETITION FOR WRIT OF CERTIORARI.

Petitioner's original assignments of error (Appendix "H - J") filed in August, 1974,

and his amended assignments of error (Appendix "K - M"), fail to raise any constitutional question. No more graphic illustration of the fact (that petitioner has failed to assert the same federal issues in the Florida District Court of Appeal which are now presented to this Honorable Court) can be found than the simple examination of the brief filed in the District Court of Appeal (a copy of which is attached hereto). The arguments so eloquently presented as constitutional issues to this Court, were there presented as mere questions of Florida law without citation to any federal authority.

This Court has consistently held that it will not consider such federal issues which have not been presented to the appropriate state courts Fuller v. Oregon,

417 U.S. 40 (1974); Facon v. Arizona, 410 U.S. 351 (1973); Hill v. California, 401 U.S. 797 (1971); Monks v. New Jersey, 398 U.S. 71 (1970); Cardinale v. Louisiana, 394 U.S. 437 (1969).

Respondent submits that the instant cause is clearly appropriate for adherence to this rule.

CONCLUSION

Neither the Florida Supreme Court's interpretation of the Florida Constitution, nor the federal issues presented to this Court which have not been presented to the trial court or District Court of Appeal, justify this Court's granting of the petition for writ of certiorari.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General
State of Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT IN OPPOSITION was furnished by mail to the HONORABLE IRVING ANOLIK, Counsel for Petitioner, 225 Broadway, New York, New York 10007, this _____ day of November, 1976.

JOEL D. ROSENBLATT
Assistant Attorney General

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APPENDIX

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APPENDIX A

Constitution of the State of Florida (1971)

* * *

Article V JUDICIAL DEPARTMENT

* * *

Section 4. Supreme Court-

* * *

(2) JURISDICTION. Appeals from trial courts may be taken directly to the supreme court, as a matter of right, only from judgments imposing the death penalty, from final judgments or decrees directly passing upon the validity of a state statute or a federal statute or treaty, or construing a controlling provision of the Florida or federal constitution, and from final judgments or decrees in proceedings for the validation of bonds and certificates of indebtedness. The supreme court may directly review by certiorari interlocutory orders

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or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court. In all direct appeals and interlocutory reviews by certiorari, the supreme court shall have such jurisdiction as may be necessary to complete determination of the cause on review.

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state

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officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

The supreme court may issue writs of mandamus and quo warranto when a state officer, board, commission, or other agency authorized to represent the public generally, or a member of any such board, commission, or other agency, is named as respondent, and writs of prohibition to commissions established by law, to the district courts of appeal, and to the trial courts when questions are involved upon which a direct appeal to the supreme court is allowed as a matter of right.

APPENDIX D

The supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction.

The supreme court or any justice thereof may issue writs of habeas corpus returnable before the supreme court or any justice thereof, or before a district court of appeal or any judge thereof, or before any circuit judge.

The supreme court shall provide for the transfer to the court having jurisdiction of any matter subject to review when the jurisdiction of another appellate court has been improvidently invoked.

* * *

APPENDIX E

Constitution of the State of Florida (1973)

* * *

ARTICLE V JUDICIARY

* * *

SECTION 3. SUPREME COURT

* * *

(b) JURISDICTION.—The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from orders of trial courts and decisions of district courts of appeal initially and directly passing on the validity of a state statute or a federal statute or treaty, or construing a provision of the state or federal constitution.

(2) When provided by general law, shall hear appeals from final judgments and orders of trial courts imposing life

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imprisonment or final judgments entered in proceedings for the validation of bonds or certificates of indebtedness.

(3) May review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, that passes upon a question certified by a district court of appeal to be of great public interest, or that is in direct conflict with a decision of any district court of appeal or of the supreme court on the same question of law, and any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the supreme court; and may issue writs of certiorari to commissions established by general law having statewide jurisdiction.

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(4) May issue writs of prohibition to courts and commissions in causes within the jurisdiction of the supreme court to review, and all writs necessary to the complete exercise of its jurisdiction.

(5) May issue writs of mandamus and quo warranto to state officers and state agencies.

(6) May, or any justice may, issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge.

(7) Shall have the power of direct review of administrative action prescribed by general law.

APPENDIX H

IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DADE COUNTY

STATE OF FLORIDA, : CASE NO.: 74-354

Plaintiff, : Criminal Division
vs. : ASSIGNMENTS OF ERROR
LLOYD GARMISE, :
Defendant. :
_____ :

COMES NOW The Defendant/Appellant, LLOYD GARMISE, by and through his undersigned attorneys, and makes and enters the following Assignments of Error on which he will rely on the above-styled cause.

1. That the Trial Court erred in denying the Defendant's Motion for a Directed Verdict of Acquittal where the evidence clearly demonstrated inconsistency with Defendant's guilt of First Degree Murder and the State's

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evidence was legally insufficient to contradict the Defendant's explanation of the crime.

2. That the State committed error in alluding to the Defendant's wealth.
3. That the Court erred in receiving into evidence numerous color photographs of the body of the Deceased, which were highly prejudicial to the Defendant and of no probative value.
4. That the State committed error on Closing Argument in advising the Jury to accept the testimony of their own witness with a great deal of skepticism, although the State is bound by their own witnesses' testimony.

WHITMAN & WOLFE, P.A.
ATTORNEYS FOR DEFENDANT
SUITE 806 FORTE PLAZA BLDG.
1401 BRICKELL AVENUE
MIAMI, FLORIDA 33131

APPENDIX J

By Irving J. Whitman

I HEREBY CERTIFY that a true and correct copy of the foregoing ASSIGNMENTS OF ERROR was mailed to State Attorney's Office, 1351 Northwest 12th Street, Miami, Florida, this 14th day of August, 1974.

By Irving J. Whitman

APPENDIX K

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

LLOYD GARMISE, : CASE NO. 74-1134
Defendant-Appellant, : MOTION FOR LEAVE TO
vs. : AMEND ASSIGNMENTS
THE STATE OF FLORIDA, : OF ERROR AND EXTEN-
Plaintiff-Appellee. : SION OF TIME TO FILE
: BRIEF
:

COMES NOW The Defendant-Appellant, LLOYD GARMISE, by and through his undersigned attorney, and moves the Court for Leave to Amend his Assignments of Error to include the following:

- "4. That the Court erred in denying Appellant's Requested Jury Instructions".
- "5. That the Court erred in permitting substitution of evidence and not granting a mistrial upon the Appellant's motion for same".

That the said Assignments of Error is an integral part of this Appeal and your under-

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signed believes that it should be considered as a basis for reversal.

That as a result of your undersigned being on vacation, together with his office staff, and until the Appellant's Motion for leave to Amend his Assignments of Error is determined, it will be necessary for your undersigned to have an additional thirty (30) days in which to file his main brief.

Your undersigned respectfully requests your consideration in this matter.

Respectfully submitted,

IRVING J. WHITMAN, ESQUIRE
WHITMAN & WOLFE, P.A.
ATTORNEY FOR DEFENDANT-
APPELLANT
SUITE 806 FORTE PLAZA BLDG.
1401 BRICKELL AVENUE
MIAMI, FLORIDA 33131
379-2444

By Irving J. Whitman

APPENDIX M

I HEREBY CERTIFY that a true and correct copy of the foregoing MOTION FOR LEAVE TO AMEND ASSIGNMENTS OF ERROR AND EXTENSION OF TIME TO FILE BRIEF was mailed to HONORABLE ROBERT L. WHEVIN, Attorney General, Attorney for Plaintiff-Appellee, State Office Building, 1350 Northwest 12th Avenue, Miami, Florida, this 3rd day of September, 1974.

By Irving J. Whitman